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11 **IN THE UNITED STATES DISTRICT COURT FOR THE**  
12 **NORTHERN DISTRICT OF CALIFORNIA**  
13 **SAN FRANCISCO DIVISION**

14 DAVID VAN ELZEN and RONALD  
15 RODRIGUEZ, individually and on  
16 behalf of all others similarly situated,

17 Plaintiffs,

18 v.

19 TAX GROUP CENTER, INC., a  
20 California corporation,

21 Defendant.

Case No.

**CLASS ACTION COMPLAINT**

**JURY TRIAL DEMANDED**

22 **CLASS ACTION COMPLAINT**

23 Plaintiff David Van Elzen (“Van Elzen”) and Plaintiff Ronald Rodriguez  
24 (“Rodriguez”) (collectively “Plaintiffs”) bring this Class Action Complaint and  
25 Demand for Jury Trial (“Complaint”) against Defendant Tax Group Center, Inc.  
26 (“Tax Group” or “Defendant”) to: (1) stop Defendant’s practice of placing calls  
27 using an automatic telephone dialing system (“ATDS”) and/or using an artificial or  
28 prerecorded voice to the cellular telephones of consumers nationwide without their

1 prior express consent, (2) stop unsolicited calls to consumers who are registered on  
 2 the Do Not Call Registry, (3) enjoin Defendant from continuing to place pre-  
 3 recorded telephone calls to consumers who did not provide their prior written  
 4 express consent to receive them or who are registered on the do not call registry,  
 5 and (4) obtain redress for all persons injured by its conduct. Plaintiffs, for their  
 6 Complaint, alleges as follows upon personal knowledge as to themselves and their  
 7 own acts and experiences, and, as to all other matters, upon information and belief,  
 8 including investigation conducted by their attorneys.

### 9 **PARTIES**

10 1. Plaintiff Dave Van Elzen is a natural person and a resident of the State  
 11 of Wisconsin, in the City of Appleton, Outagamie County.

12 2. Plaintiff Ronald Rodriguez is a natural person and a resident of the  
 13 State of Texas, in the City Lytle, Bexar County.

14 3. Defendant Tax Group Center, Inc. is a company incorporated and  
 15 existing under the laws of the State of California. Its headquarters is located One  
 16 Market, Spear Tower, 36<sup>th</sup> floor, San Francisco, California 94105. Defendant does  
 17 business throughout the United States, including in the State of California and in  
 18 this District.<sup>1</sup>

### 19 **JURISDICTION & VENUE**

20 4. This Court has federal subject matter jurisdiction under 28 U.S.C.  
 21 §1331 as the action arises under the Telephone Consumer Protection Act, 47 U.S.C  
 22 § 227 *et seq.*, which is a Federal statute.

23 5. The Court has personal jurisdiction over Defendant and venue is  
 24 proper in this District because Defendant is registered to do business in the State of  
 25 California, is headquartered in this District, and regularly conducts business in the  
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27 <sup>1</sup> Defendant filed a Statement of Information with the California Secretary of State on October 29,  
 28 2015.

1 State of California and in this District.

2 6. Venue is proper in this District under 28 U.S.C. § 1391(b) because  
3 Defendant resides in this District, conducts a significant amount of business within  
4 this District, and because the wrongful conduct giving rise to this case occurred in,  
5 was directed to, and/or emanated from this District.

6  
7 **COMMON ALLEGATIONS OF FACT**

8  
9 7. Defendant Tax Group is a company that specializes in providing debt-  
10 relief solutions for consumers who are significantly indebted to the Internal  
11 Revenue Service (IRS).<sup>2</sup>

12 8. Unfortunately for consumers, Defendant casts its marketing net too  
13 wide. That is, in an attempt to promote Defendant's IRS debt-relief services,  
14 Defendant conducted (and continues to conduct) a wide-scale telemarketing  
15 campaign that features the making of repeated unsolicited prerecorded telephone  
16 calls to consumers' cellular telephones without consent, and even those who have  
17 registered their number on the National Do Not Call Registry - all in violation of  
18 the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* ("TCPA").

19 9. As explained by the Federal Communications Commission ("FCC") in  
20 its 2012 order, the TCPA requires "*prior express written consent* for all autodialed  
21 or prerecorded telemarketing calls to wireless numbers and residential lines." *In the*  
22 *Matter of Rules and Regulations Implementing the Telephone Consumer Protection*  
23 *Act of 1991*, CG No. 02-278, FCC 12-21, 27 FCC Rcd. 1830 ¶ 2 (Feb. 15, 2012).

24 10. Yet in violation of this rule, Defendant fails to obtain any prior express  
25 written consent to make these autodialed calls using a prerecorded voice to cellular  
26 telephone numbers.

27  
28 <sup>2</sup> <http://www.linkedin.com/company/tax-group-center-inc->

11. In an attempt to solicit its services, namely its IRS debt-relief services, Defendant utilizes an “automatic telephone dialing system” (“ATDS”) to contact or attempt to contact prospective consumers.

12. Defendant’s employees make hundreds of calls per day, a signal that an autodialer is being used. As noted by Defendant in an advertisement for employment:

Daily responsibilities include, but not limited to: Working Monday -- Friday 40 hours a week, *make around 125 outbound calls daily*, daily call log report.<sup>3</sup> (Emphasis added - See the screenshot produced below).

**Dialer/Sales**

Tax Group Center - Calabasas, CA

\$12 an hour

We are a rapidly growing company that is seeking 1-2 qualified people to make outbound calls for our sales team. and we are not a call center. This is a Full time hourly pay position with potential to grow.

What we desire in a candidate is: self motivation, a customer service attitude, integrity, a willingness to learn, and exceptional people skills. Applicant must be familiar with basic user end of MS office (email, word, excel)

Daily responsibilities include, but not limited to: Working Monday -- Friday 40 hours a week, make around 125 outbound calls daily, daily call log report.

13. Furthermore, as evidenced by the screenshot produced below, a former employee for Defendant reveals that he or she was required to place approximately 250 calls per day and keep a daily log report.<sup>4</sup>

**Enrolled Agent / Resolution Manager**

Tax Group Center, Inc.

February 2011 – February 2014 (3 years 1 month) | Calabasas, CA

-Dialer (250+ dials/day)

-Case Assistant (Preparing forms, client phone calls, case management)

-Enrolled Agent/Power of Attorney (400+case management for IRS/State tax resolution programs)

-- 99 client taxpayers with OIC's accepted in 2013 for savings of over 3 million dollars.

-Resolution Manager (observe all employee productivity and efficiency, complex account resolution)

14. Defendant calls consumers on their cellular telephones using an ATDS without their prior written express consent in violation of the TCPA.

<sup>3</sup> <http://www.indeed.com/job/dialersales-dd0f4da87f9125a4>

<sup>4</sup> <http://www.linkedin.com/in/jonathan-mccormick-91106768>

15. Defendant fails to obtain any prior express written consent to make the prerecorded calls described herein to cellular telephone numbers.

16. Consumer complaints about Defendant's invasive and repetitive calls are legion. As a sample, consumers have complained as follows:

- "Called this afternoon on my cell I am on the DNC and use my landline for IRS d also ng which I am D along with now from my sister who passed away jerks not the IRS nothing to do with the IRS."<sup>5</sup>
- "I pressed 3 to stop the calls but they keep calling. Sometimes the# changes by one digit, but it's still them. I updated my # on the do not call list last month and it seems like they call even more than before."<sup>6</sup>
- "The Robocall said that I qualify for IRS Tax relief program. Scaaammmm alert"<sup>7</sup>
- "Urgent message! Our records indicate you are eligible for IRS Tax Debt Relief!! - BLOCKED"<sup>8</sup>
- "Woke us up at 0730 with their robo-promise to help us with our taxes. We'll keep getting these criminal calls until the criminals in Wash. DC put some jail time and manpower behind nailing the phone crooks. Probably won't happen in our lifetimes ..."<sup>9</sup>

17. In placing the calls that form the basis of this Complaint, Defendant, or its affiliated entities, utilized an ATDS in violation of the TCPA. Specifically, the hardware and software used by Defendant has the capacity to generate and store random numbers, and/or receive and store lists of telephone numbers, and to dial

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<sup>5</sup> <http://800notes.com/Phone.aspx/1-203-242-8296>

<sup>6</sup> <http://800notes.com/Phone.aspx/1-203-242-8296/2>

<sup>7</sup> *Id.*

<sup>8</sup> <http://800notes.com/Phone.aspx/1-203-242-8296/2>

<sup>9</sup> *Id.*

1 such numbers, *en masse*, in an automated fashion without human intervention.  
2 Defendant's automated dialing equipment also is, or includes features substantially  
3 similar to, a predictive dialer, meaning that it is capable of making numerous phone  
4 calls simultaneously and automatically connecting answered calls to then available  
5 callers and disconnecting the rest (all without human intervention).

6 18. Telemarketers who wish to avoid calling numbers listed on the  
7 National Do Not Call Registry can easily and inexpensively do so by "scrubbing"  
8 their call lists against the National Do Not Call Registry database. The scrubbing  
9 process identifies those numbers on the National Do Not Call Registry, allowing  
10 telemarketers to remove those numbers and ensure that no calls are placed to  
11 consumers who opt-out of telemarketing calls.

12 19. To avoid violating the TCPA by calling registered numbers,  
13 telemarketers must scrub their call lists against the Registry at least once every  
14 thirty-one days. *See* 16 C.F.R. § 310.4(b)(3)(iv).

15 20. There are numerous third party services that will additionally scrub  
16 call lists for a telemarketer to segment out landline and cellular telephone numbers,  
17 since the consent standards differ depending on what type of phone a telemarketer  
18 is calling.<sup>10</sup> Indeed, one such service notes that it can:

19 Instantly verify whether a specific phone number is wireless or  
20 wireline to learn if TCPA regulations apply – and verify the identity of  
21 the current subscriber to determine if they are the same party who  
22 provided you with consent.<sup>11</sup>

23 21. When placing its calls to consumers, Defendant failed to get the prior  
24 express consent required by the TCPA of cellular telephone owners/users as  
25 required by the TCPA to make such calls.

26 22. Furthermore, Defendant calls consumers who have no "established

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27 <sup>10</sup> See e.g. <http://www.dncsolution.com/do-not-call.asp>; <http://www.donotcallprotection.com/do-not-call-compliance-solutions-1>; [http://www.mindwav.com/tcpa\\_compliance\\_solution.asp](http://www.mindwav.com/tcpa_compliance_solution.asp);

28 <sup>11</sup> <https://www.neustar.biz/services/tcpa-compliance>

1 business relationship” with Defendant, and Defendant failed to scrub its lists to  
2 ensure that it was not placing calls to person’s whose numbers were registered on  
3 the Do Not Call Registry. As a result, it called persons whose numbers were  
4 registered on the Do Not Call Registry.

5 23. Finally, even when consumers try to opt out of future calls by  
6 requesting to never be called again, Defendant continues to call them.

7 24. Defendant knowingly made (and continues to make) telemarketing  
8 calls to cellular telephones without the prior express consent of the call recipients.  
9 As such, Defendant not only invaded the personal privacy of Plaintiffs and other  
10 members of the putative Classes but also intentionally and repeatedly violated the  
11 TCPA.

#### 12 **FACTS SPECIFIC TO PLAINTIFF VAN ELZEN**

13 25. On June 10, 2011, Plaintiff Van Elzen registered his cellular telephone  
14 number on the National Do Not Call Registry to avoid receiving unsolicited  
15 telemarketing calls on his cellular telephone.

16 26. More than 30 days after Plaintiff Van Elzen registered his cellular  
17 telephone number on the National Do Not Call Registry, Tax Group, either directly,  
18 or through its affiliates and agents, made a series of unsolicited telemarketing calls  
19 to Plaintiff Van Elzen. The calls came to Plaintiff Van Elzen on his cellular  
20 telephone using an artificial or prerecorded voice. The calls began in or around  
21 October 2016.

22 27. Tax Group utilized telephone number 203-242-8296 to place its  
23 unsolicited prerecorded calls to Plaintiff Van Elzen.

24 28. All of the prerecorded telephone calls from Tax Group were made to  
25 solicit Plaintiff Van Elzen to obtain its services in resolving tax-related problems.

26 29. On at least one occasion, when Plaintiff Van Elzen answered one of  
27 Tax Group’s calls, a prerecorded voice explained to him that the call was in  
28

1 reference to a tax-relief program. He was instructed to press #1 to speak to Tax  
2 Group's representative and to press #3 to be removed from Tax Group's list.

3 30. At no time did Plaintiff Van Elzen consent to the receipt of pre-  
4 recorded calls to his cellular telephone from Tax Group, let alone provide prior oral  
5 or written express consent to Tax Group for such calls to be placed.

6 31. By making unauthorized prerecorded telephone calls as alleged herein,  
7 Tax Group has caused consumers actual harm. In the present case, a consumer  
8 could be subjected to multiple, repeating unsolicited pre-recorded calls regardless  
9 of whether consumers consented to receiving them or not. Tax Group caused Van  
10 Elzen and the members of the Classes actual harm and cognizable legal injury. This  
11 includes the aggravation and nuisance and invasions of privacy that result from the  
12 receipt of such calls and a loss of value realized for the monies consumers paid to  
13 their wireless carriers for the receipt of such calls. Furthermore, the calls interfered  
14 with Van Elzen's and the other Class members' use and enjoyment of their  
15 cellphones, including the related data, software, and hardware components. Tax  
16 Group also caused substantial injury to their phones by causing wear and tear on  
17 their property, consuming battery life, and in certain cases appropriating cellular  
18 minutes, in addition to the invasion of privacy and nuisance of having to answer  
19 such unsolicited calls.

20 32. To redress these injuries, Plaintiff brings suit under the Telephone  
21 Consumer Protection Act, 47 U.S.C. § 227, *et seq.*, which prohibits unsolicited  
22 autodialed calls to cellular telephones.

23 33. On behalf of the Classes, Plaintiff also seek an injunction requiring  
24 Tax Group to cease all unsolicited and unauthorized prerecorded calling activities  
25 and an award of statutory damages to the class members, together with costs and  
26 reasonable attorneys' fees to be paid from a common fund established for the  
27 benefit of the Classes.



**FACTS SPECIFIC TO PLAINTIFF RODRIGUEZ**

34. On December 19, 2004, Plaintiff Rodriguez registered his cellular telephone number on the National Do Not Call Registry to avoid receiving unsolicited telemarketing calls on his cellular telephone.

35. More than 30 days after Plaintiff Rodriguez registered his cellular telephone number on the National Do Not Call Registry, Tax Group, either directly, or through its affiliates and agents, made a series of unsolicited telemarketing calls to Plaintiff Rodriguez. The calls came to Plaintiff Rodriguez on his cellular telephone using an artificial or pre-recorded voice. The calls began on or around December of 2016.

36. Tax Group utilized telephone numbers 830-212-6739, 830-266-5013, and 830-214-7637 to place its unsolicited prerecorded calls to Plaintiff Rodriguez.

37. As an illustrative example (and not one of limitation) Tax Group contacted or attempted to contact Plaintiff Rodriguez on the following dates:

December 26, 2016 (3 calls);

December 27, 2016;

December 28, 2016;

December 29, 2016;

December 30, 2016

January 2, 2017;

January 3, 2017;

January 4, 2017;

January 5, 2017;

January 9, 2017;

January 13, 2017;

January 16, 2017; and

January 17, 2017 (3 calls).

1           38. All of the prerecorded telephone calls from Tax Group were made to  
2 solicit Plaintiff Rodriguez to obtain its IRS debt-relief services.

3           39. On at least one occasion, when Plaintiff Rodriguez answered one of  
4 Tax Group's calls, an automated recording explained to him that the call was in  
5 reference to a tax-relief program. He was instructed to press #1 to speak to Tax  
6 Group's representative and to press #9 to be removed from Tax Group's list.  
7 Plaintiff Rodriguez pressed #9 to be removed from Tax Group's list.

8           40. In addition to pressing #9 to discontinue receiving calls—and due to  
9 Tax Group's barrage of calls—Plaintiff Rodriguez was forced to request that Tax  
10 Group stop calling him several times via voice messages left on Tax Group's  
11 message machine.

12           41. At no time did Plaintiff Rodriguez consent to the receipt of  
13 prerecorded calls to his cellular telephone from Tax Group, let alone provide prior  
14 oral or written express consent to Tax Group for such calls to be placed.

15           42. By making unauthorized prerecorded telephone calls after being told to  
16 stop as alleged herein, Tax Group has caused consumers actual harm. In the present  
17 case, a consumer could be subjected to multiple, repeating unsolicited prerecorded  
18 calls because Tax Group's opt-out mechanism does not work. Tax Group caused  
19 Plaintiff Rodriguez and the members of the Classes actual harm and cognizable  
20 legal injury. This includes the aggravation and nuisance and invasions of privacy  
21 that result from the receipt of such calls and a loss of value realized for the monies  
22 consumers paid to their wireless carriers for the receipt of such calls. Furthermore,  
23 the calls interfered with Rodriguez's and the other Class members' use and  
24 enjoyment of their cellphones, including the related data, software, and hardware  
25 components. Tax Group also caused substantial injury to their phones by causing  
26 wear and tear on their property, consuming battery life, and in certain cases  
27 appropriating cellular minutes, in addition to the invasion of privacy and nuisance  
28

1 of having to answer such unsolicited calls.

2 43. To redress these injuries, Rodriguez, on behalf of himself and the  
3 Classes of similarly situated individuals alleged in this Complaint, brings suit under  
4 the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.*, which prohibits  
5 unsolicited autodialed calls to cellular telephones.

6 44. On behalf of the Classes, Rodriguez also seek an injunction requiring  
7 Tax Group to cease all unsolicited and unauthorized prerecorded calling activities  
8 and an award of statutory damages to the class members, together with costs and  
9 reasonable attorneys' fees to be paid from a common fund established for the  
10 benefit of the Classes.

## 11 12 CLASS ACTION ALLEGATIONS

13  
14 45. Plaintiffs bring this action pursuant to Federal Rule of Civil Procedure  
15 23(a), (b)(2), and (b)(3) on behalf of themselves and the three classes defined as  
16 follows:

17 **Prerecorded No Consent Class:** All persons in the United States who  
18 from the four years prior to the date of the filing of the instant action  
19 (1) Defendant (or a third person acting on behalf of Defendant) called,  
20 (2) on the person's cellular telephone, (3) for the purpose of selling  
21 Defendant's products and services, (4) using a prerecorded voice, and  
22 (5) for whom Defendant claims it obtained prior express consent in the  
same manner as Defendant claims it supposedly obtained prior express  
consent to call the Plaintiffs.

23 **Prerecorded Stop Class:** All persons in the United States who from  
24 the four years prior to the date of the filing of the instant action (1)  
25 Defendant (or a third person acting on behalf of Defendant) called, (2)  
26 on the person's cellular telephone, (3) for the purpose of selling  
27 Defendant's products and services, (4) using a prerecorded voice, (4)  
after the person informed Defendant that s/he no longer wished to  
receive calls from Defendant.

1       **Do Not Call Registry Class:** All persons in the United States who (1)  
2 Defendant (or a third person acting on behalf of Defendant) called  
3 more than one time on his/her telephone; (2) within any 12-month  
4 period (3) where the telephone number had been listed on the National  
5 Do Not Call Registry for at least thirty days; (4) for the purpose of  
6 selling Defendant's products and services; and (5) for whom  
7 Defendant claims it obtained prior express consent in the same manner  
8 as Defendant claims it obtained prior express consent to call the  
9 Plaintiffs.

10       46. The following people are excluded from the Classes: (1) any Judge or  
11 Magistrate presiding over this action and members of their families; (2) Defendant,  
12 Defendant's subsidiaries, parents, successors, predecessors, and any entity in which  
13 the Defendant or its parents have a controlling interest and its current or former  
14 employees, officers and directors; (3) persons who properly execute and file a  
15 timely request for exclusion from the Classes; (4) persons whose claims in this  
16 matter have been finally adjudicated on the merits or otherwise released; (5)  
17 Plaintiffs' counsel and Defendant's counsel; and (6) the legal representatives,  
18 successors, and assigns of any such excluded persons. Plaintiffs anticipate needing  
19 to amend the class definitions following reasonable and appropriate class discovery.

20       47. On information and belief, there are hundreds, if not thousands, of  
21 members of the Classes such that joinder of all members is impracticable.

22       48. There are several questions of law and fact common to the claims of  
23 Plaintiffs and the other members of the Classes, and those questions predominate  
24 over any questions that may affect individual members of the Classes. Common  
25 questions for the Class members that may be answered in a single stroke include but  
26 are not limited to the following:

27               a. whether Defendant's conduct constitutes a violation of the  
28               TCPA;

              b. whether Defendant utilized an automatic telephone dialing  
              system or pre-recorded voice to place pre-recorded calls to

1 members of the Classes;

- 2 c. whether members of the Classes are entitled to treble damages  
3 based on the willfulness of Defendant's conduct;  
4 d. whether Defendant obtained prior express written consent to  
5 contact any class members on their cellular telephones;  
6 e. whether Defendant systematically made multiple telephone calls  
7 to consumers whose telephone numbers were registered with the  
8 National Do Not Call Registry and whether calls were made to  
9 such persons after they requested to no longer be called;  
10 f. whether Plaintiffs and the members of the Do Not Call Class are  
11 entitled to treble damages based on the willfulness of  
12 Defendant's conduct.

13 49. The factual and legal bases of Defendant's liability to Plaintiffs and to  
14 the other members of the Classes are the same, resulting in injury to the Plaintiffs  
15 and to all of the other members of the Classes, including the annoyance and  
16 aggravation associated with such pre-recorded calls as well as the loss of cellular  
17 plan minutes and temporary inability to enjoy and use their cellphones, as a result  
18 of the transmission of the pre-recorded calls alleged herein. Plaintiffs and the other  
19 members of the Classes have all suffered harm and damages as a result of  
20 Defendant's unlawful and wrongful conduct of placing pre-recorded calls.  
21 Plaintiffs' claims are typical of the claims of the members of the Classes as all  
22 members of the Classes are similarly affected by Defendant's wrongful conduct.  
23 Plaintiffs, like other members of the Classes, received unsolicited pre-recorded calls  
24 from Defendant. Plaintiffs are advancing the same claims and legal theory on behalf  
25 of themselves and all absent members of the Classes.

26 50. Plaintiffs will fairly and adequately represent and protect the interests  
27 of the other members of the Classes. Plaintiffs' claims are made in a representative  
28

1 capacity on behalf of the other members of the Classes. Plaintiffs have no interest  
2 antagonistic to the interests of the other members of the proposed Classes and is  
3 subject to no unique defenses. Plaintiffs have retained counsel with substantial  
4 experience in prosecuting complex litigation and class actions. Plaintiffs and their  
5 counsel are committed to vigorously prosecuting this action on behalf of the  
6 members of the Classes, and have the financial resources to do so. Neither Plaintiffs  
7 nor their counsel have any interest adverse to those of the other members of the  
8 Classes.

9       51. The suit may be maintained as a class action under Federal Rule of  
10 Civil Procedure 23(b)(2) because Defendant has acted, and/or has refused to act, on  
11 grounds generally applicable to the Classes, thereby making appropriate final  
12 injunctive relief. Specifically, injunctive relief is necessary and appropriate to  
13 require Defendant to discontinue placing unsolicited and unauthorized pre-recorded  
14 calls to the public. Likewise, Defendant has acted and fails to act on grounds  
15 generally applicable to the Plaintiffs and the other members of the Classes in  
16 placing the pre-recorded calls at issue, requiring the Court's imposition of uniform  
17 relief to ensure compatible standards of conduct toward the members of the Classes.

18       52. In addition, this suit may be maintained as a class action under Federal  
19 Rule of Civil Procedure 23(b)(3) because a class action is superior to all other  
20 available methods for the fair and efficient adjudication of this controversy. Absent  
21 a class action, most members of the Classes would find the cost of litigating their  
22 claims to be prohibitive, and will have no effective remedy. The class treatment of  
23 common questions of law and fact is also superior to multiple individual actions or  
24 piecemeal litigation in that it conserves the resources of the courts and the litigants,  
25 and promotes consistency and efficiency of adjudication. The claims asserted herein  
26 are applicable to all consumers throughout the United States who received an  
27 unsolicited and unauthorized pre-recorded call from Defendant. The injury suffered  
28

by each individual class member is relatively small in comparison to the burden and expense of individual prosecution of the complex and extensive litigation necessitated by Defendant's conduct. It would be virtually impossible for members of the Classes individually to redress effectively the wrongs done to them. Even if the members of the Classes could afford such litigation, the court system could not. Individualized litigation presents a potential for inconsistent or contradictory judgments. Individualized litigation increases the delay and expense to all parties, and to the court system, presented by the complex legal and factual issues of the case. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

53. Adequate notice can be given to the members of the Classes directly using information maintained in Defendant's records or through notice by publication.

**FIRST CAUSE OF ACTION**  
**Telephone Consumer Protection Act**  
**(Violation of 47 U.S.C. § 227, *et seq.*)**  
**(On Behalf of Plaintiffs and the Prerecorded No Consent Class)**

54. Plaintiffs incorporate by reference the foregoing allegations as if fully set forth herein.

55. Defendant made unsolicited and unwanted telemarketing calls to telephone numbers belonging to Plaintiffs and the other members of the Pre-recorded No Consent Class on their cellular telephones in an effort to sell its products and services using a prerecorded voice as defined in the TCPA.

56. Defendant made the telephone calls using equipment that had the capacity to store or produce telephone numbers to be called using a random or sequential number generator, and/or receive and store lists of phone numbers, and to dial such numbers, *en masse*.

57. Defendant utilized equipment that made the telephone calls to



1 Plaintiffs and other members of the Prerecorded No Consent Class simultaneously  
2 and without human intervention.

3 58. Defendant failed to obtain any prior express written consent from  
4 Plaintiffs and other called parties that included, as required by 47 C.F.R. §  
5 64.1200(f)(8)(i) a “clear and conspicuous” disclosure informing the person signing  
6 that:

7 (A) By executing the agreement, such person authorizes the seller to  
8 deliver or cause to be delivered to the signatory telemarketing calls  
9 using an automatic telephone dialing system or an artificial or  
10 prerecorded voice; and

11 (B) The person is not required to sign the agreement (directly or  
12 indirectly), or agree to enter into such an agreement as a condition of  
13 purchasing any property, goods, or services.

14 59. Any consent that was supposedly obtained required Plaintiffs and the  
15 Class members to receive autodialed and prerecorded calls.

16 60. Defendant also failed to obtain any prior express oral consent of the  
17 persons receiving its prerecorded telephone calls.

18 61. By making unsolicited telephone calls to Plaintiffs and members of the  
19 Prerecorded No Consent Class’s cellular telephones using a prerecorded voice,  
20 Defendant violated 47 U.S.C. § 227(b)(1)(B) by doing so without prior express  
21 consent as required.

22 62. As a result of Defendant’s unlawful conduct, Plaintiffs and the  
23 members of the Prerecorded No Consent Class suffered actual damages in the form  
24 of monies paid to receive the unsolicited telephone calls on their cellular phones  
25 and, under Section 227(b)(3)(B), are each entitled to, *inter alia*, a minimum of \$500  
26 in damages for each such violation of the TCPA.

27 63. Should the Court determine that Defendant’s conduct was willful and  
28 knowing, the Court may, pursuant to Section 227(b)(3), treble the amount of



1 statutory damages recoverable by Plaintiffs and the other members of the  
2 Prerecorded No Consent Class.

3 **SECOND CAUSE OF ACTION**  
4 **Telephone Consumer Protection Act**  
5 **(Violation of 47 U.S.C. § 227, *et seq.*)**  
6 **(On Behalf of Plaintiff Rodriguez and the Prerecorded Stop Class)**

7 64. Plaintiff Rodriguez incorporates by reference the foregoing allegations  
8 as if fully set forth herein.

9 65. Defendant made unsolicited and unwanted prerecorded calls to  
10 telephone numbers belonging to Plaintiff Rodriguez and the other members of the  
11 Prerecorded Stop Class on their cellular telephones after they had informed  
12 Defendant, orally and/or through the Defendant's automated prompt system, that  
13 they no longer wished to receive such calls from Defendant.

14 66. Defendant made the telephone calls using equipment that had the  
15 capacity to store or produce telephone numbers to be called using a random or  
16 sequential number generator, and/or receive and store lists of phone numbers, and  
17 to dial such numbers, *en masse*.

18 67. Defendant utilized equipment that made the telephone calls to Plaintiff  
19 Rodriguez and other members of the Prerecorded Stop Class simultaneously and  
20 without human intervention.

21 68. By making unsolicited telephone calls to Plaintiff Rodriguez and other  
22 members of the Prerecorded Stop Class's cellular telephones using a prerecorded  
23 voice after they requested to no longer receive such calls, Defendant violated 47  
24 U.S.C. § 227(b)(1)(B) by doing so without prior express consent.

25 69. As a result of Defendant's unlawful conduct, Plaintiff Rodriguez and  
26 the members of the Prerecorded Stop Class suffered actual damages in the form of  
27 monies paid to receive the unsolicited telephone calls on their cellular phones and,  
28 under Section 227(b)(3)(B), are each entitled to, inter alia, a minimum of \$500 in

1 damages for each such violation of the TCPA.

2 70. Should the Court determine that Defendant's conduct was willful and  
3 knowing, the Court may, pursuant to Section 227(b)(3), treble the amount of  
4 statutory damages recoverable by Plaintiff Rodriguez and the other members of the  
5 Pre-recorded Stop Class.

6  
7 **THIRD CAUSE OF ACTION**  
8 **Telephone Consumer Protection Act**  
9 **(Violation of 47 U.S.C. § 227, *et seq.*)**  
10 **(On Behalf of Plaintiffs and the Do Not Call Registry Class)**

11 71. Plaintiffs incorporate by reference the foregoing allegations as if fully  
12 set forth herein.

13 72. 47 U.S.C. § 227(c) provides that any "person who has received more  
14 than one telephone call within any 12-month period by or on behalf of the same  
15 entity in violation of the regulations prescribed under this subsection may" bring a  
16 private action based on a violation of said regulations, which were promulgated to  
17 protect telephone subscribers' privacy rights to avoid receiving telephone  
18 solicitations to which they object.

19 73. The TCPA's implementing regulation, 47 C.F.R. § 64.1200(c),  
20 provides that "[n]o person or entity shall initiate any telephone solicitation" to "[a]  
21 residential telephone subscriber who has registered his or her telephone number on  
22 the national do-not-call registry of persons who do not wish to receive telephone  
23 solicitations that is maintained by the federal government."

24 74. 47 C.F.R. § 64.1200(e), provides that § 64.1200(c) and (d) "are  
25 applicable to any person or entity making telephone solicitations or telemarketing  
26 calls to wireless telephone numbers to the extent described in the FCC's July 3,  
27 2003 Report and Order, which in turn, provides as follows:

28 The Commission's rules provide that companies making telephone

1 solicitations to residential telephone subscribers must comply with  
2 time of day restrictions and must institute procedures for maintaining  
3 do-not-call lists. For the reasons described above, we conclude that  
4 these rules apply to calls made to wireless telephone numbers. We  
5 believe that wireless subscribers should be afforded the same  
6 protections as wireline subscribers.<sup>12</sup>

7 75. 47 C.F.R. § 64.1200(d) further provides that “[n]o person or entity  
8 shall initiate any call for telemarketing purposes to a residential telephone  
9 subscriber unless such person or entity has instituted procedures for maintaining a  
10 list of persons who request not to receive telemarketing calls made by or on behalf  
11 of that person or entity. The procedures instituted must meet the following  
12 minimum standards:

13 (1) Written policy. Persons or entitles making calls for telemarketing  
14 purposes must have a written policy, available upon demand, for  
15 maintaining a do-not-call list.

16 (2) Training of personnel engaged in telemarketing. Personnel engaged  
17 in any aspect of telemarketing must be informed and trained in the  
18 existence and use of the do-not-call list.

19 (3) Recording, disclosure of do-not-call requests. If a person or entity  
20 making a call for telemarketing purposes (or on whose behalf such a  
21 call is made) receives a request from a residential telephone subscriber  
22 not to receive calls from that person or entity, the person or entity must  
23 record the request and place the subscriber’s name, if provided, and  
24 telephone number on the do-not-call list at the time the request is  
25 made. Persons or entities making calls for telemarketing purposes (or  
26 on whose behalf such calls are made) must honor a residential  
27 subscriber’s do-not-call request within a reasonable time from the date  
28 such request is made. This period may not exceed thirty days from the  
date of such request . . . .

(4) Identification of sellers and telemarketers. A person or entity

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<sup>12</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003) Available at [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-03-153A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-03-153A1.pdf)

1 making a call for telemarketing purposes must provide the called party  
2 with the name of the individual caller, the name of the person or entity  
3 on whose behalf the call is being made, and a telephone number or  
4 address at which the person or entity may be contacted. The telephone  
number provided may not be a 900 number or any other number for  
which charges exceed local or long distance transmission charges.

5 (5) Affiliated persons or entities. In the absence of a specific request by  
6 the subscriber to the contrary, a residential subscriber's do-not-call  
7 request shall apply to the particular business entity making the call (or  
8 on whose behalf a call is made), and will not apply to affiliated entities  
9 unless the consumer reasonably would expect them to be included  
given the identification of the caller and the product being advertised.

10 (6) Maintenance of do-not-call lists. A person or entity making calls  
11 for telemarketing purposes must maintain a record of a consumer's  
12 request not to receive further telemarketing calls. A do-not-call request  
must be honored for 5 years from the time the request is made.

13  
14 76. Defendant violated 47 C.F.R. § 64.1200(c) by initiating, or causing to  
15 be initiated, telephone solicitations to landline and wireless telephone subscribers  
16 such as Plaintiffs and the Do Not Call Registry Class members who registered their  
17 respective telephone numbers on the National Do Not Call Registry, a listing of  
18 persons who do not wish to receive telephone solicitations that is maintained by the  
19 federal government. These consumers requested to not receive calls from  
20 Defendant, as set forth in 47 C.F.R. § 64.1200(d)(3).

21 77. Defendant also violated 47 C.F.R. § 64.1200(d) by failing to have a  
22 written policy available on demand for dealing with do not call requests, by failing  
23 to inform or train its personnel engaged in telemarketing regarding the existence  
24 and/or use of any do not call list, by failing to internally record and honor do not  
25 call requests, and by failing to honor do not call requests within 30 days.

26 78. Defendant made more than one unsolicited telephone call to Plaintiffs  
27 and other members of the Do Not Call Registry Class within a 12-month period  
28 without their prior express consent to receive such calls. Plaintiffs and other

1 members of the Do Not Call Registry Class never provided any form of consent to  
2 receive telephone calls from Defendant, and/or Defendant does not have a current  
3 record of consent to place telemarketing calls to them.

4 79. Defendant violated 47 C.F.R. § 64.1200(d) by initiating calls for  
5 telemarketing purposes to residential and wireless telephone subscribers, such as  
6 Plaintiffs and the Do Not Call Registry Class, without instituting procedures that  
7 comply with the regulatory minimum standards for maintaining a list of persons  
8 who request not to receive telemarketing calls from them.

9 80. Defendant violated 47 U.S.C. § 227(c)(5) because Plaintiffs and the Do  
10 Not Call Registry Class received more than one telephone call in a 12-month period  
11 made by or on behalf of Defendant in violation of 47 C.F.R. § 64.1200, as described  
12 above. As a result of Defendant's conduct as alleged herein, Plaintiffs and the Do  
13 Not Call Registry Class suffered actual damages and, under section 47 U.S.C. §  
14 227(c), are each entitled, *inter alia*, to receive up to \$500 in damages for such  
15 violations of 47 C.F.R. § 64.1200.

16 81. To the extent Defendant's misconduct is determined to be willful and  
17 knowing, the Court should, pursuant to 47 U.S.C. § 227(c)(5), treble the amount of  
18 statutory damages recoverable by the members of the Do Not Call Registry Class.

19  
20 **PRAYER FOR RELIEF**

21 **WHEREFORE**, Plaintiffs Van Elzen and Rodriguez, on behalf of  
22 themselves and the Classes, pray for the following relief:

23 A. An order certifying the Classes as defined above, appointing  
24 Plaintiff Van Elzen and Plaintiff Rodriguez as the representatives of the  
25 Classes, and appointing their counsel as Class Counsel;

26 B. An award of actual monetary loss from such violations or the  
27 sum of five hundred dollars (\$500.00) for each violation, whichever is greater  
28

1 all to be paid into a common fund for the benefit of the Plaintiffs and the  
2 Class Members;

3 C. An order declaring that Defendant's actions, as set out above,  
4 violate the TCPA;

5 D. A declaratory judgment that Defendant's telephone calling  
6 equipment constitutes an automatic telephone dialing system under the  
7 TCPA;

8 E. An order requiring Defendant to disgorge any ill-gotten funds  
9 acquired as a result of its unlawful telephone calling practices;

10 F. An order requiring Defendant to identify any third-party  
11 involved in the pre-recorded calling as set out above, as well as the terms of  
12 any contract or compensation arrangement it has with such third parties;

13 G. An injunction requiring Defendant to cease all unsolicited pre-  
14 recorded calling activities, and otherwise protecting the interests of the  
15 Classes;

16 H. An injunction prohibiting Defendant from using, or contracting  
17 the use of, an automatic telephone dialing system without obtaining, and  
18 maintaining records of, call recipient's prior express written consent to  
19 receive calls made with such equipment;

20 I. An injunction prohibiting Defendant from contracting with any  
21 third-party for marketing purposes until it establishes and implements  
22 policies and procedures for ensuring the third-party's compliance with the  
23 TCPA;

24 J. An injunction prohibiting Defendant from conducting any future  
25 telemarketing activities until it has established an internal Do Not Call List as  
26 required by the TCPA;

1           K.     An award of reasonable attorneys' fees and costs to be paid out  
2 of the common fund prayed for above; and

3           L.     Such other and further relief that the Court deems reasonable  
4 and just.

5                               **JURY DEMAND**

6           Plaintiffs request a trial by jury of all claims that can be so tried.

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Respectfully submitted,

Dated: March 3, 2017

**DAVID VAN ELZEN and  
RONALD RODRIGUEZ,**  
individually, and on behalf of all  
others similarly situated,

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*Counsel for Plaintiff and the Putative  
Classes*

*\*Admission pro hac vice to be sought*



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